No. 73-1530

APR 1
MICHAEL ROD

In the Supreme Court of the United States

OCTOBER TERM, 1973

ALVIN I. MALNIK,

Petitioner,

vs.

UNITED STATES OF AMERICA and CARL ROSEN, Revenue Agent of the Internal Revenue Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on February 8, 1974.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida, dated February 17, 1972, is not reported, but is printed in full as Appendix A hereto. The opinion of the United States District Court for the Southern District of Florida, dated June 10, 1972, is reported at 348 F.Supp. 1273, and is printed in full as Appendix B hereto. The opinion of the United States

Court of Appeals for the Fifth Circuit, dated February 8, 1974, is reported at 489 F.2d 842, and is printed in full as Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals (Appendix C, *infra*) was entered on February 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is the Fifth Amendment claim against self-incrimination properly invoked only by interposing the privilege as to specifically propounded questions?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to the Constitution of the United States

> "No person . . . shall be compelled in any criminal case to be a witness against himself; . . ."

26 U.S.C. §7602

> "Examination of books and witnesses:
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of

such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

26 U.S.C. §7604

"Enforcement of summons:

(a) Jurisdiction of district court. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e) (2), 6421(f) (2), 6424(d) (2), 6427(e) 2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall

have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

STATEMENT

The principal petitioner in the district court was Internal Revenue Agent Carl K. Rosen who is conducting a tax audit of Alvin I. Malnik for the years 1959, 1960, 1962 and 1963. On March 16, 1971, Agent Rosen issued an Internal Revenue Service summons to the taxpayer pursuant to 26 U.S.C. § 7602. This summons required Alvin I. Malnik to appear and give testimony relating to his tax liability for the aforementioned years as well as to produce for examination certain books, records and papers.

The summons was directed to the taxpayer in his *individual* capacity only and not as a representative of a business entity in any form whatever, though he was requested, *inter alia,* to produce his records of corporations in which he was stockholder, officer and director. (App. 7)[1] The tax years covered by the summons included, at least in part, those years which were the subject of prior criminal tax proceedings instituted against the taxpayer. (App. 76)

On March 29, 1971, Harvey M. Silets, taxpayer's counsel, contacted Revenue Agent Rosen for the purpose of obtaining a continuance of taxpayer's appearance. The new agreed date was April 21, 1971. (App. 10) On April 20, 1971, Mr. Silets conferred with Agent Rosen by telephone and the date for compliance with the summons was continued from April 21, 1971 to May 4, 1971. (App. 12, 17) During the course of this conversation, Mr. Silets informed Mr. Rosen that the summons was "confusing and unclear on its

[1] Citation is to Appendix on appeal to the Fifth Circuit.

face", (App. 16), even in light of the letter sent by Mr. Rosen to Mr. Silets, dated March 29, 1971, attempting to explain the documents requested. (App. 20) On the same date, April 20, 1971, Mr. Silets also conferred with Mr. Holloway, Assistant Regional Counsel for the Internal Revenue Service. (App. 17) In this conversation it was agreed between the Internal Revenue Service and Mr. Silets, as counsel for taxpayer, that *in lieu* of the appearance of taxpayer on May 4, 1971, the Internal Revenue Service would accept a written statement directed to Mr. Rosen and signed by Mr. Silets and the taxpayer, indicating that taxpayer would claim his Constitutional privileges to such of the questions which were asked of him to which said privileges attached and to those of the records enumerated in the summons which were in his possession and to which the privileges attached. (App. 17) Mr. Rosen acknowledged this agreement in its entirety by his letter of April 20, 1971 to Mr. Silets, (App. 21), and Mr. Silets complied by directing a letter, dated April 21, 1971, to Mr. Rosen confirming the agreement. (App. 12, 13)

On December 7, 1971, more than seven months after the agreement *in lieu* of appearance, the Government filed its Petition to Enforce Internal Revenue Summons pursuant to 26 U.S.C. § 7604. (App. 4-14) Mr. Rosen's affidavit, which was attached to said Petition, was to the effect that petitioner "by letter dated April 21, 1971, . . . would make a blanket refusal to comply with the summons . . ." (App. 11)

In response to the Petition, taxpayer filed a verified answer which contained, *inter alia*, two affirmative defenses to the Petition. (App. 16-19) The first affirmative defense set forth the facts underlying the agreement in lieu of appearance as related hereinabove and asserted that the "summons was confusing and unclear on its face", (App. 16), while the second affirmative defense read in pertinent part as follows:

• • •

2. The records heretofore summoned are personal in nature to him and include individual, partnership and such copies of corporate records which may be in his own personal possession rather than those which may be held by him in some representative capacity of such corporation.

• • •

3. Respondent has claimed his privileges under the Fifth Amendment to the Constitution of the United States to such requested testimony and production of personal records in the same manner and as if he had personally appeared and been asked the questions to which such privilege attached and required to produce such records to which the privilege attached.

• • •

Initially, the district court entered an order directing compliance with the summons.[2] Subsequently, on June 10, 1972, pursuant to taxpayer's motion for reconsideration, the court reversed its position and ordered the dismissal of the Petition to Enforce Internal Revenue Summons, sustaining taxpayer's invocation of his Fifth Amendment privilege.[3] The district court specifically found that the agreement in lieu of appearance did not constitute a "blanket refusal" and noted further that the "agreed procedure was no more than a useful and commendable effort by both sides to avoid going through a mere formality." (App. 75) Taking cognizance of *Hoffman* v. *United States*, 341 U.S. 479 and *United States* v. *Coffey*, 198 F.2d 438, 440 (3d Cir. 1952), the district court held:

> "We conclude that under the setting in which the questions are sought to be asked and in light of the potential dangers pointed out by Respondent's counsel, it is apparent that even seemingly innocuous questions

[2] Opinion of the district court attached hereto as Appendix A.

[3] Opinion of the district court attached hereto as Appendix B.

relating to Respondent's tax liabilities for the instant tax years and the production of his records clearly suggest potential connecting links through which Respondent's answers might lead to and might result in his incrimination." (App. 80)

The Government then moved the district court to alter its order with regard to alleged corporate records. On July 6, 1972, the motion was denied on the grounds that the records sought therein were personal to the taxpayer and hence were covered by the protective cloak of the Fifth Amendment. In addition, the Court found that the summons was, in any event, overly broad and lacking in clarity. (App. 90-93)

Though rejecting the district court's reasoning, the Court below affirmed the dismissal of the enforcement petition on the ground that the mutual agreement between the Internal Revenue Service and Mr. Malnik that he need not appear pursuant to the summons constituted a waiver of any rights the Internal Revenue Service may have had.[4] As a footnote to its ultimate finding of waiver, the Court below stated that "[b]ecause we disagree with the reasoning of the district court, but affirm its judgment on a wholly different ground, we do not think that the doctrine of res judicata would preclude the IRS from issuing another subpoena pertaining to the same subject matter." The Court below concluded that taxpayer's assertion of his privilege against self-incrimination under the Fifth Amendment was a "blanket refusal" to answer. The Court reasoned that unless specific questions were asked, no claim could be valid and a refusal to answer, albeit one pursuant to an agreed procedure without specific questions, was an impermissible "blanket" claim of the privilege.

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[4] Opinion of the Fifth Circuit Court of Appeals attached hereto as Appendix C.

REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to distinguish a "blanket" invocation of a Fifth Amendment claim from the generally accepted procedure of asserting the privilege to specific questions propounded by the investigating body. A writ of certiorari should here be granted for the purpose of defining the scope of the protection afforded a respondent by this Court in *Hoffman* v. *United States,* 341 U.S. 479. *Hoffman* enunciated the prevailing guidelines by which a respondent's invocation of his Fifth Amendment privilege against compelled testimony or production of records is to be judged. Mr. Justice Clark carefully set forth the showing that the person claiming the privilege must make in order for its invocation to be sustained:

> "To sustain the privilege, it need only be evident from the implications of the question, *in the setting in which it is asked,* that a responsive answer to the question or an explanation of why it cannot be answered *might* be dangerous because injurious disclosure could result." 341 U.S. at 486, 487. (Emphasis supplied)

The respondent, upon interposing his claim, is not required to prove the hazard in the sense in which a claim is otherwise required to be established because he would then be compelled to surrender the very protection which the privilege is designed to guarantee. *Hoffman,* 341 U.S. at 486. The respondent will only be ordered to reply if it clearly appears to the court that he is mistaken in his claim of the privilege. *Hoffman,* 341 U.S. at 486, cf., *Rogers* v. *United States,* 340 U.S. 367. The determination as to the invocation of the privilege must be governed as much

by the district court's perception of the peculiarities of the case at hand as by the facts in evidence. *Hoffman*, 341 U.S. at 487; *United States* v. *Coffey*, 198 F.2d 438 (3d Cir. 1952); *United States* v. *Wilcox*, 450 F.2d 1131 (5th Cir. 1971), cert. den. 405 U.S. 917.

The Court below held that the *Hoffman* showing could only be made upon the propounding of specific questions by the investigating body and the interposition of the privilege as to each question so asked.[5]

Whether the question by question approach is the *exclusive* means of properly invoking the Fifth Amendment claim against self-incrimination is an issue that has never been decided by this Court and is a question which has caused conflicting decisions among the various circuits. In *United States* v. *Wilcox*, 450 F.2d 1131 (5th Cir. 1971), cert. den. 405 U.S. 917, the privilege was sustained in the absence of specific questions being propounded to the respondent in the trial court.

If the question by question approach is not the exclusive means of properly invoking a respondent's Fifth Amendment claim, then the procedure mutually agreed upon with the Government constitutes such facts and circumstances as to sustain the taxpayer-respondent's claim of privilege. Unlike the cases relied upon by the Court below in categorizing the agreed upon procedure as a "blanket re-

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[5] The Court relied for its holding on *United States v. Ponder*, 475 F.2d 37 (5th Cir. 1973), *United States v. Ellsworth*, 460 F.2d 1246 (9th Cir. 1972), *Capitol Products Corp.* v. *Hernon*, 457 F.2d 541 (8th Cir. 1972), and *United States v. Roundtree*, 420 F.2d 845 (5th Cir. 1969) all of which decisions were premised on a respondent's *unilateral* blanket refusal to answer questions or produce documents.

fusal'' to testify, the respondent herein would have appeared, as summonsed, but for the agreement reached with the Internal Revenue Service. By accepting a statement from the respondent that it would accept the assertion of the Fifth Amendment to those inquiries to which it applied, and then denying the respondent the very protection it agreed to give him, the Government has, in effect, deprived the respondent of a clear cut choice between answering or refusing to answer any specific question or producing or refusing to produce any specific document. Cf. *Emspak* v. *United States,* 349 U.S. 190.

Further, there is still another independent ground why the question by question approach of invoking the Fifth Amendment claim is not required in the case at bar for the respondent to properly claim the privilege. The Internal Revenue Code only permits the issuance of a summons to require testimony and/or produce documents which may be relevant and material to a taxpayer's potential tax liabilities. 26 U.S.C. § 7602. The subject summons, which is presumably in conformity with this statute, would, of necessity, have engendered only such questions and requests for documents as were material and relevant to respondent's possible tax liabilities for the years enumerated in the summons. Cf., *Donaldson* v. *United States.* 400 U.S. 517. Thus, the district court was required to view the possible inquiries which would be made pursuant to the summons as being limited, as a matter of law, to such questions and requests for documents as related specifically to respondent's potential tax liabilities for the specified years.

In light of the limited scope and purpose of an Internal Revenue Service summons, the district court took cognizance of the taxpayer's past relationship with the Internal

Revenue Service. Taxpayer had been investigated, indicted and subsequently tried on two criminal tax charges for acts alleged to have taken place during years covered by the instant summons. (App. 76) Any relevant and material tax inquiries would, of legal necessity, encompass the same subject matter as that testified to by taxpayer in the prior criminal tax proceedings, *Donaldson* v. *United States,* 400 U.S. 517, and could elicit answers that might tend to incriminate taxpayer. See e.g., *United States* v. *Beacon Brass Co.,* 344 U.S. 43. The ritualistic formality of specific questions being propounded under these circumstances is not within the letter or spirit of this Court's holding in *Hoffman* v. *United States,* 341 U.S. 479.

This case offers the Court the opportunity to establish when, if ever, the privilege against self-incrimination can be properly invoked by a respondent in the absence of specific questions being propounded to him.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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